Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT 06/03/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

MARY-ELLEN WALTER

v.

DARNELL MOSES ALVAREZ (002)

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has read and considered *Defendant's Motion for Enmund/Tison Finding before Presentation of Aggravation Evidence and for Use of Juror Interrogatories,* the State's response and the defendant's reply. The Court has also considered the arguments of counsel.

Defendant moves for an *Edmund/Tison* finding[1] to be made by the jury following the guilt phase but before the aggravation phase. The State agrees that an *Enmund/Tison* finding needs to be made by the jury in this case, but objects to bifurcating it from the aggravation phase.

The Arizona Supreme Court has noted that the *Enmund/Tison* finding should be made during the aggravation phase, but that bifurcation may be appropriate in some cases to avoid unfair prejudice to the defendant, for example, in cases where evidence about an aggravating circumstance was not presented in the guilt phase. *See State v. Garcia*, 224 Ariz. 1, ¶¶40-46, 226 P.3d 370 (2010) (trial court's refusal to bifurcate did not unfairly prejudice the defendant because evidence of his involvement in an earlier robbery would have been admissible in separate *Enmund/Tison* phase to establish his reckless indifference to human life; thus, the jury

[1] A defendant convicted of felony murder is eligible for the death penalty only if the State proves he "himself kill[s], attempt[s] to kill, or intend[s] that a killing take place or that lethal force will be employed," *Enmund v. Florida*, 458 U.S. 782, 797 (1982), or is a major participant in a felony and acts "with reckless indifference to human life," *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

would still have heard about the most damning of his prior convictions during a separate *Enmund/Tison* phase).

The Supreme Court also has rejected the defendant's argument that a combined proceeding will cause the jury to be confused as to which evidence relates to which determination and will return verdicts on improper grounds:

> No statute or case requires a jury to make the *Enmund/Tison* findings before deciding the existence of aggravating circumstances. *See* A.R.S. § 13-752(C), (P) (requiring jury to address both issues in aggravation phase); *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), *abrogated on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987) ("At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution."). Moreover, simultaneous consideration of the *Enmund/Tison* and aggravating circumstances issues did not invite impermissible findings. The aggravation phase consisted solely of argument by counsel and instruction by the court; no evidence was presented. Thus, no risk existed that the jury would hear new evidence applicable only to one issue to decide the other. And nothing reflects that the jury was confused about having to make independent *Enmund/Tison* and aggravation inquiries. The court instructed the jury that Forde would be eligible for the death penalty only if the State proved both that Forde met the *Enmund/Tison* threshold and that at least one aggravating circumstance existed. The court also provided separate verdict forms for the *Enmund/Tison* findings and the existence of aggravating circumstances.
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> *State v. Forde*, 233 Ariz. 543, ¶89, 315 P.3d 1200 (2014).

As was done in *Forde*, the Court intends to instruct the jurors that each of them must find at least one *Enmund/Tison* factor has been proven but that they all need not find that it is the same factor. However, the Court further intends to include on the *Enmund/Tison* verdict form an interrogatory wherein the jury will set out its numerical breakdown regarding each of the four *Enmund/Tison* factors.

The State asserts that Defendant will not be prejudiced by combining the proceedings because "the evidence that will be presented to prove the Enmund/Tison factors and the aggravating factors will be predominantly the same evidence that will be presented during the guilt phase of the trial. The only additional evidence that may be admitted would be relevant to the pain and suffering component of the F6 aggravator." (Response at 4). While the State may be correct in its perception of the evidence, the Court believes that it will be best to defer ruling on

whether or not to bifurcate the *Enmund/Tison* finding from the aggravation phase until after the completion of evidence in the guilt phase.

Accordingly,

IT IS ORDERED denying in part and granting in part Defendant's Motion for *Enmund/Tison* Finding before Presentation of Aggravation Evidence and for Use of Juror Interrogatories, with leave to re-raise the bifurcation issue after completion of evidence in the guilt phase.